No. 751

MAR 12 1956

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

AMERE GAS UTILITIES COMPANY,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA
Appellee.

UPON APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

STATEMENT AS TO JURISDICTION

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A Corporation,
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v.

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UPON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

I

Opinions Delivered Below

The opinions and orders below are not reported.

The final order of the Supreme Court of Appeals of West Virginia entered December 9, 1955, denying Appellant's appeal from the final order of the Public Service Commission of West Virginia is attached as Appendix A. The final order of the Public Service Commission of West Virginia dated June 30, 1955, in this case (No.

4129) is attached as Appendix B; its order dated March 24, 1955, granting a rehearing is attached as Appendix C; and its order dated February 25, 1955 is attached as Appendix D. The report and order of the Public Service Commission of West Virginia dated August 31, 1953, in Case No. 3888, which was incorporated by reference into the Commission's orders dated February 25, 1955, and June 30, 1955, in this case, is attached hereto as Appendix E. (The record in Case No. 3888 was also incorporated into this record. (T. 134))

II

Grounds on Which Jurisdiction of This Court Is Invoked

This is an appeal by Amere Gas Utilities Company (hereinafter called Amere) under 28 U.S.C. § 1257(2), as amended (62 Stat. 929), from a final judgment of the Supreme Court of Appeals of West Virginia (hereinafter called the court below) entered on the 9th day of December, 1955 sustaining the validity of a statute of the State (final order of the Public Service Commission of West Virginia). The validity of such statute was challenged before the Court below on the grounds that it is repugnant to the Constitution of the United States, the Natural Gas Act, (52 Stat. 821-833; 15 U.S.C. §§ 717-717W), affirmative orders and rules of the Federal Power Commission (hereinafter called FPC) issued pursuant thereto.

The Public Service Commission of West Virginia (hereinafter called PSC) by an order dated February 25, 1955, prescribed permanent rates to be charged by Amere for natural gas service in the State of West Virginia. On March 24, 1955, pursuant to Amere's petition

filed March 7, 1955, the PSC reopened the proceeding to receive new evidence, and on June 30, 1955, it entered the final order confirming its order dated February 25, 1955.

Pursuant to Chapter 24, Article 5, Section 1 of the Official Code of West Virginia of 1931, as amended, (Michie's Section 2577)[1] Amere petitioned the court below on July 29, 1955 for a suspension and judicial review of the PSC's final order. The court below by final judgment made and entered on the 9th day of December, 1955, after reciting that it had maturely considered the record which was before the PSC, denied Amere's petition "for the reason that the final order of the Public Service Commission of West Virginia, dated June 30, 1955, is found to be plainly right." (Appendix A)

Consistent with its long standing practice (for more than 20 years) with respect to petitions to review rate cases, the court below did not write an opinion.

Amere's notice of appeal was filed in the Supreme Court of Appeals of West Virginia on February 9, 1956. Title 28 U.S.C. 1257(2) confers jurisdiction upon this Court to review upon appeal final judgments or decrees rendered by the highest court of a state, where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution or laws of the United States. Under repeated rulings of this Court, for jurisdictional purposes, the final order of the PSC must be treated as an act of the state legislature. *The Atchison, Topeka and Santa Fe Railway Company* v. *Public Utilities Commission of California*, 346 U. S. 346, 74 S. Ct. 92, 98 L. ed. 51, (1953); *Live Oak*

[1]Found in Appendix F hereof.

Water Users' Assoc. v. *Railroad Commission*, 269 U. S 354, 46 S. Ct. 149, 70 L. ed. 305, (1926); *Ex Parte Wil liams*, 277 U. S. 267, 48 S. Ct., 523, 72 L. ed. 877, (1928)

The statute of the State of West Virginia (the fina order of the PSC) is not yet reported, but is set forth in Appendix B, and orders incorporated therein by refer ence are set forth in Appendices C and D.

III

Questions Presented

1

Is the property of Amere confiscated within the mean ing of the Due Process Clause of the Fourteenth Amend ment by the PSC's refusal to allow Amere to recover the actual cost of gas purchased and paid for pursuant to a FPC tariff rate under the Natural Gas Act?

2

Does the order of the PSC violate the Due Process Clause by arbitrarily substituting fictional costs in lieu of the actual costs of purchased gas, without supporting evidence, and without making any study or determina tion of the cost of providing service?

3

Does the order of the PSC obstruct and burden inter state commerce by depriving Amere of a return on the greater part of its property, as a result of which Amere's ability to continue selling gas in interstate commerce for resale under the Natural Gas Act is impaired?

4

Does the order of the PSC unlawfully burden and ob struct interstate commerce by requiring the sale (neces

sitating the abandonment of existing sales) and transportation of natural gas in interstate commerce on terms and conditions and at prices fixed by the PSC contrary to rates and orders of the FPC under the Natural Gas Act?

IV

Statement of the Case

Amere Gas Utilities Company, a subsidiary of The Columbia Gas System, Inc., is a West Virginia corporation engaged in the business of distributing natural gas to customers in three separate areas in West Virginia. Amere does not produce any gas (T. 225) nor does it have pipe lines interconnecting the three separate areas served. (See map, Exhibit 17)

Amere initiated gas service in its Beckley-Mullens area in October, 1929, at which time its entire supply of gas was purchased from local producers in that area. In 1931 Atlantic Seaboard Corporation (hereinafter referred to as Atlantic) constructed its 20-inch pipe line from Boldman, Kentucky to eastern markets. This pipe line made gas available for the first time for distribution in Amere's Lewisburg-Ronceverte-White Sulphur Springs area and its Princeton-Athens area, and Amere initiated gas service in those areas in 1931 and 1932 with gas obtained from Atlantic. There is still no other source of supply available to these areas except one isolated well with insignificant production. Amere sells gas acquired from local producers in its Beckley-Mullens area to George W. Willis for resale locally, and since 1951, it has sold gas in interstate commerce (through facilities in its Princeton-Athens area) to Bluefield Gas Company for resale, subject to the jurisdiction of the Federal Power Commission. (Case No. 3888, Exhibit 1, pp. 5-6)

The requirements of Amere's markets have greatly increased in recent years and there is no longer sufficient gas produced in its Beckley-Mullens area to meet the requirements of its customers in that area duri. g the heating season. There is, however, a surplus of locally produced gas in that area during summer months. The winter requirements of Amere's customers are several times as great as their summer requirements. For example, on an average day in August, Amere sold 2,046 Mcf of gas at retail, but on January 29, 1952 it sold 22,187 Mcf of gas or eleven times the average daily sales for August and three times the average daily sales for the entire year. (Exhibit No. 1, p. 8, Case No. 3888) Amere's Beckley-Mullens area, which has a surplus of gas from local production during summer months, required gas from Atlantic on 170 days in 1952. (Case No. 3888, T. 31) Gas is, therefore, a surplus commodity during summer months and at a premium during winter months.

Atlantic has the same problem, (T. 461-462) and this is generally the situation throughout the gas industry. (T. 458-459) Winter gas, being at a premium, is more expensive than gas which is available in abundance during summer months. (T. 314) Consequently, large independent producers sometimes shut-in their non-competitive wells during summer months so they can sell the gas at a higher price during winter months. (T. 401) Pipe line companies sell natural gas under a two-part, demand and commodity rate under which the average cost per Mcf increases as the variation between summer and winter sales increases. (T. 314, 280) Atlantic purchases most of its gas supply under a two-part rate of this type. (T. 280)

In 1948 Columbian Carbon Company, a non-affiliated independent producer, developed some gas production in Raleigh County, West Virginia near Amere's Beckley-Mullens area and Amere attempted to purchase such gas. (T. 395) Columbian Carbon Company, however, for reasons of its own, refused to enter into a contract with Amere as the sole purchaser. A representative of Columbian Carbon Company testified that his company wanted to be assured of a broader market than Amere's, (T. 177, Case No. 3888) and the vice president of that company testified that he was directed not to sell the gas to Amere but to sell only to a major gas company. (T. 397, Exhibit 19)

Amere and Atlantic, therefore, entered into a contract with Columbian Carbon Company for the joint purchase of the latter's Raleigh County production, and (Exhibit No. 9, Case No. 3888) Amere and Atlantic entered into a separate contract which is on file with the FPC as Rate Schedules of both Atlantic and Amere. (T. 297-300, 302, Case No. 3888 T. 34) These FPC Rate Schedules provide that (a) Amere purchases the Columbian Carbon gas on any day that such gas can be utilized in Amere's Beckley-Mullens area; (b) on any day that such gas can not be so utilized it is purchased by Atlantic and delivered to Atlantic by Amere; (c) As consideration for Amere delivering the Columbian Carbon Company gas to Atlantic on the days that Amere can not utilize such gas, Atlantic accepts from Amere all gas which the latter purchases from other producers in the Beckley-Mullens area in excess of its current requirements in that area and delivers to Amere equal volumes of gas in its other operating areas as needed. (Case No. 3888, Exhibit 1, Appendix I)

The Issues

The only issues in this case relate to the PSC's refusal to permit Amere to recover, through its rates, costs of $184,000 per year[2] admittedly incurred in the purchase of natural gas from Atlantic, an interstate pipe-line company, at rates subject to the exclusive jurisdiction of the FPC under Sections 4 and 5 of the Natural Gas Act (52 Stat. 822-823, 1938, 15 U.S.C. 717c and 717d).

The PSC rationalizes its disallowance of Amere's admittedly actual cost of gas purchased at FPC rates by finding that four gas companies[3] which are subject to FPC jurisdiction, should abandon certain interstate service, including Atlantic's interstate sales to Amere. In lieu thereof, the PSC found that certain specific service should be initiated, including interstate transportation of gas to Amere by Atlantic, which is not authorized to transport gas for others.

Thus, sharp conflicts between State and Federal law were created, the West Virginia Commission attempting, in effect, to override and nullify Federal regulation of interstate commerce.

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[2]As will be more fully discussed below, this is the equivalent of depriving the Company of a return on 85% of its investment.

[3]These four companies, which were not parties to the proceeding, are:

(1) Atlantic Seaboard Corporation, a subsidiary of The Columbia Gas System, Inc. (T. 322-323),

(2) United Fuel Gas Company, a subsidiary of The Columbia Gas System, Inc.,

(3) Columbian Carbon Company, a non-affiliated independent producer, and

(4) Godfrey L. Cabot, a non-affiliated independent producer.

Atlantic's First FPC Rate Case

In FPC Docket No. G-1384, witnesses for the PSC testified that Atlantic's proposed rates to Amere were too high (T. 312, Case No. 3888, T. 254, 364-365), but the FPC found that such rates were discriminatory in favor of Amere, and that Amere should pay more. (Case No. 3888, T. 39)

Amere's PSC Rate Case No. 3888

Thereafter, on January 6, 1953, Amere filed increased rates with the PSC, and hearings with respect thereto were held in Case No. 3888. The PSC staff witness contended in that case that Atlantic's FPC rates to Amere were excessive and Amere should not be permitted to recover the cost of gas purchased thereunder. He criticized the FPC's rate-making policies at great length, (Case No. 3888, T. 369-374) and stated among other things, "I wanted to mention this case because it shows that under the Natural Gas Act all the costs and considerations are not given weight in rate-making." (Case No. 3888, T. 371) He concluded that "it shows me in regard to this case that Federal Power is interested in gas over in the east and not in West Virginia—the price of the gas over east.", and "The Natural Gas Act was mentioned as controlling in the Amere case and I wanted to show the Commission how the Federal Power handles the regulation under the Natural Gas Act, and [therefore] should we be bound by the action of Federal Power." (Case No. 3888, T. 372)

Counsel for Amere moved to strike all of the evidence given by the Commission's staff witness which eliminated from operating expenses the cost of gas purchased at

FPC rates. Counsel stated, "We are not responsible for the Natural Gas Act nor the Federal Power Commission nor its results but we are subject thereto. And under the Natural Gas Act the Federal Power Commission has the sole and exclusive jurisdiction over the rate charged by Atlantic Seaboard Corporation to the Amere Gas Utilities Company." (Case No. 3888, T. 376) The motion was denied, and in its final order (Appendix E) the PSC concluded that the gas sold to Amere by Atlantic at FPC rates was overpriced and disallowed all costs in excess of a price which it arbitrarily determined.

The PSC further found that the gas purchased by Atlantic from Columbian Carbon Company *during summer months* should be purchased by Amere, and in determining Amere's cost of service substituted the price paid therefor by Atlantic for the cost of equal volumes of gas actually purchased by Amere from Atlantic *during winter months.*

Amere appealed Case No. 3888 to the Court below. The appeal was denied, and a further appeal to this Court was dismissed for lack of a substantial federal question. *Amere Gas Utilities Company* v. *Public Service Commission*, 347 U. S. 910, 74 S. Ct. 894, 98 L. ed. 1067 (1954).

Atlantic's Subsequent FPC Rate Case

At the time Amere's appeal to this Court was dismissed, a proceeding involving Atlantic's rates was pending before the FPC in Docket No. G-2054. That proceeding was terminated by a stipulated agreement, after conferences among the staff of the FPC, Atlantic's customers and a representative of the PSC of West Virginia. At the settlement conferences, representatives of Amere,

Atlantic and the PSC urged that Atlantic's rates to Amere be established on the basis of the PSC's order. (T. 320, Mr. Ryder's affidavit, PSC's Statement of Reasons pp. 23-24) The FPC acquiesced in the PSC rate for gas sold by Atlantic to Amere, but rejected the PSC's finding that the Columbian Carbon Company gas purchased by Atlantic should be purchased by Amere. It treated such purchases in accordance with Atlantic's FPC Rate Schedule X-10 and Amere's FPC Rate Schedule X-1. (T. 303, 320. PSC's Statement of Its Reasons, pp. 23-24)

After the proceeding in FPC Docket No. G-2054 was concluded, Amere was still paying more for the gas purchased than it was recovering through its rates, even though the issues relating to such costs had been presented to both the PSC and the FPC. It was, therefore, necessary for Amere to institute the instant proceeding in an attempt to recoup this substantial cost as well as increased costs incurred subsequent to the PSC's final order in Case No. 3888.

The Instant Case

The rates in the instant proceeding were designed to recover the loss resulting from different treatment of the Columbian Carbon Company gas by the two commissions and the increase from forty cents (40c) to fifty cents (50c) per Mcf in price of gas purchased from Atlantic, which increase became effective November 1, 1954.[4]

In its filing in this proceeding, on August 9, 1954, Amere requested the PSC to join with the FPC in a con-

[4]Subsequent to Amere's Case No. 3888 and the settlement of Atlantic's FPC rate case in Docket No. G-2054, *supra*, Atlantic's rates were increased to all customers except Amere, effective February 1, 1954 (Docket No. G-2275) and to all customers, including Amere, effective November 1, 1954 (Docket No. G-2452). (T. 31)

current hearing with respect to this case and increased interstate rates which Amere filed with the FPC on July 20, 1954, "for the purpose of developing a joint record."[5] Amere's Vice President testified that concurrent hearings were requested of both commissions in the hope that "the full problems of Amere could be considered by the two commissions and an equitable solution found." (T. 305-306) The PSC proceeded with hearings and decided this case and the FPC has not yet heard the case before it. (T. 387)

The PSC's final order is incomplete upon its face, and it is necessary to go to the record to determine how its conclusions were reached.

The PSC stated in its order (Appendix D), that it had set out the formula or plan it used in arriving at its conclusions in its report and order in Case No. 3888 (Appendix E), and that it would not restate those conclusions in the instant case except to say that its Staff's Exhibit in the instant case and its conclusions had followed such formula or plan.

In its Statement of Reasons for Entry of Its Final Order, which is required by statute, (Appendix F) the PSC stated:

> *"Amere's position in both this case and Case No. 3888 is and has been that the price which it shall pay to Atlantic for gas must be governed by rates which the Federal Power Commission fixes from time to time for sales of gas made in interstate com-*

[5]Section 17 of the Natural Gas Act (52 Stat. 830 (1938); 15 U.S.C. 717p) authorizes the Federal Power Commission to confer with any State Commission "regarding rate structures, *costs*, and charges, *practices*, classifications, and * * * to hold joint hearings with any State Commission." (Emphasis added)

merce by Atlantic. The persistence of Amere in treating as the cost of gas to be the price it pays to Atlantic pursuant to a tariff filed by Atlantic with the Federal Power Commission is the plan or design to which the Commission objects and which it has rejected." (p. 16) (Emphasis supplied)

The Commission's report and order in Case No. 3888 (Appendix E) is ambiguous but its formula and conclusions were explained in detail on the record in this proceeding by the PSC's witness (T. 243 *et seq.*, 247, 259, 260, 277, 278) and the presiding Commissioner, (T. 261) and the PSC order (Appendix D) sanctions the staff witness' explanation. Also, at page 2 of its final order (Appendix B), the PSC relied upon the testimony of its staff accountant with respect to the availability of gas to meet Amere's requirements in conformity with the PSC plan in Case No. 3888.

The PSC staff accountant testified that the following should be done to make a sufficient quantity of gas available to Amere in accordance with the PSC's plan.

1. Amere should cease purchasing natural gas from Atlantic, (T. 233, 238) its supplier since 1931. (Case No. 3888, Exhibit 1, p. 4)

2. Columbian Carbon Company, a non-affiliated, independent producer, should discontinue its sales of gas in interstate commerce to Atlantic for resale and should sell such gas to Amere. (T. 186)

3. Atlantic should continue receiving the gas it now purchases from Columbian Carbon Company during warm weather when such gas cannot be used by Amere, but Amere should purchase the gas, and Atlantic should deliver equal volumes of gas to Amere as and when needed during cold weather. (T. 186)

4. Godfrey L. Cabot, Inc., a non-affiliated, independent producer of natural gas, should abandon its sales of natural gas in interstate commerce to Atlantic for resale, and should sell such gas to United Fuel Gas Company (hereinafter referred to as United), for resale to Amere. (T. 247-248)

5. United should abandon its sales in interstate commerce of natural gas produced and purchased in West Virginia to Atlantic for resale, (under FPC certificates and rates) and should sell such gas to Amere. (T. 243, *et seq.*)

6. Atlantic, (which is engaged solely in the transportation and sale of its own gas in interstate commerce for resale, admittedly subject to the exclusive jurisdiction of the FPC under the Natural Gas Act, (T. 287, 295, 481)) should become a carrier and receive gas which it now purchases from United and Godfrey L. Cabot, Inc., and deliver such gas to Amere. (T. 243, *et seq.*)

7. United should charge Amere forty cents (40c) per Mcf for the gas which it would sell to Amere (T. 260) and United should defray Atlantic's *undetermined* costs of (a) transporting the gas to be sold by United to Amere, (b) transporting gas (never owned by United) from Amere's Beckley-Mullens area to its other operating areas (T. 270-278),* and (c) receiving Columbian Carbon Company gas (never owned by United) from Amere *in the summer* and delivering equal volumes of gas to Amere *in the winter*. (T. 277-278)

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*In consideration for Amere transporting the Columbian Carbon Company gas purchased by Atlantic, Atlantic receives gas which Amere purchases from other local producers in excess of its current requirements in its Beckley-Mullens area and delivers equal volumes to Amere in its other two operating areas, pursuant to Atlantic's FPC Rate Schedule X-10 and Amere's FPC Rate Schedule X-1.

The foregoing plan is without supporting evidence and, in fact, is counter to the operating facts as well as Federal regulation.

Unquestionably, gas service would never have been available in two of Amere's three operating areas without gas from Atlantic's pipe line, and there is no way to meet the present requirements of any of Amere's operating areas without gas from Atlantic's pipe line. Nevertheless, after more than twenty years of service by Atlantic to Amere, the PSC has decided that Atlantic should abandon such interstate sales. The PSC found, however, that Atlantic should continue delivering gas to Amere, but on a complicated exchange and transportation basis which is contrary to FPC regulation.[7]

Admittedly, Amere purchases all of the Columbian Carbon Company gas that it can utilize at the time and when Amere cannot utilize such gas, it is purchased by Atlantic and resold by Atlantic in interstate commerce for resale. Columbian Carbon Company's vice president testified that his company would not sell the gas to Amere alone. (T. 395. *et seq.*, Exhibit 29) Columbian Carbon Company was willing to contract for the sale of this gas only if the contract was signed by a major company having a broad market which could utilize the gas at all times.

If Amere purchased the gas from Columbian Carbon Company in excess of its current requirements and trans-

[7]The PSC not only interfered with FPC jurisdiction under the Natural Gas Act, but also ignored the mandate of this court in *State ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission of Missouri*, 262 U.S. 276, 43 S. Ct. 544, 67 L. ed. 981 (1923), stating that "It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership."

ported and delivered it to Atlantic, such transportation and delivery would be in interstate commerce for resale. Atlantic has no markets in West Virginia which could utilize the gas and there is no place where it could be stored for subsequent delivery to Amere. The gas which Amere would physically receive in return would consist primarily of gas purchased by Atlantic in Kentucky.

The transactions affecting the Columbian Carbon Company gas are subject to FPC Rate Schedules of both Amere and Atlantic. (T. 309-310, Case No. 3888, Exhibit 1, Appendix I, T. 106) In its statement of reasons for the entry of its final order the PSC recognized (pp. 23-24) that subsequent to Case No. 3888 both Amere and Atlantic requested the FPC to permit them to conform to the PSC's plan regarding the Columbian Carbon Company gas and that the FPC refused. The PSC concluded that the FPC's action resulted in discrimination against Amere's intrastate customers.

Godfrey L. Cabot, Inc. which was not a party to the proceeding has contracted to sell gas to Atlantic for resale in interstate commerce. Such sale is subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act. Under the PSC plan such gas should be sold to United for resale to Amere. It is conceded that neither Amere nor United have any facilities to receive such gas from Godfrey L. Cabot, Inc. and under the PSC's plan, the gas would be delivered to Atlantic, but would be sold to United for resale to Amere.

All of the gas which United sells to Atlantic and delivers into Atlantic's 20-inch pipe line, whether produced in Kentucky or West Virginia, is sold in interstate commerce for resale and is billed to Atlantic under the same FPC Rate Schedule. (T. 317-318)

It is agreed that 78 per cent of all gas in Atlantic's 20-inch pipe line, which serves Amere, is produced in Kentucky. (Stipulation dated May 3, 1955) There is no way to separate the West Virginia gas in such pipe line from the Kentucky gas. (T. 481) Even if Atlantic was a common carrier and could legally receive gas from United for the account of Amere and deliver equal volumes of gas to Amere, such transaction would be an exchange of interstate gas for West Virginia gas and subject to FPC jurisdiction.

Even if the PSC plan were otherwise practicable, the gas which it found should be made available to Amere is inadequate to meet Amere's requirements during winter months. The PSC staff witness, the PSC's consultant, and an officer of Amere, agreed that all of the gas produced in West Virginia, which under the PSC plan should be made available to Amere, is not equal to Amere's requirements during certain winter months. (T. 522, 536-537, 477) It, therefore, would be necessary under the PSC's plan for Atlantic to deliver gas purchased in Kentucky *during the winter* to Amere in exchange for gas received from United, and Godfrey L. Cabot, Inc. *in the summer.*

The Stage and Manner in Which Federal Questions Were Raised

All questions here presented were raised on the record before the PSC, which record was considered by the Court below. (T. 21, 26-27, 28, 29, *et seq.*, 110, 116, 117, 118, 137, 138, 140-141, 233, 253, 259, 260, 261, 267, 269, 277, 278, 279-280, 282, 284, 286, 287, 295, 296, 297, 300, 302, 303, 305, 309-311, 314, 316, 320, 322, 325, 381 *et seq.*)

In answer to an objection to questions asked of the Commission's Staff witness on cross-examination, Counsel for Amere stated (T. 218-219):

> "I would like to direct Mr. Tissue's attention to the Constitution of the United States, which prevents confiscation.
>
> * * * * *
>
> "I am merely attempting to bring out by this witness that subsequent to that, [Case No. 3888] the Federal Power Commission has not given us the costs that this Commission denied, and that we came back here to request those costs, and that we are caught in the middle." (See also T. 211-212)

In its petition for review of the final order of the Public Service Commission filed in the court below, Amere assigned the following errors:

> "The Commission exceeded its jurisdiction by attempting to regulate matters within the exclusive jurisdiction of the Federal Power Commission.
>
> "The order interferes with the flow of gas in interstate commerce and is in violation of the commerce clause of the Federal Constitution and the Natural Gas Act.
>
> "Petitioner was denied due process of law both procedurally and substantively, contrary to the Constitutions of the United States and the State of West Virginia.
>
> "By refusal to allow petitioner its actual operating expenses for gas purchased pursuant to a Federal Power Commission tariff, Amere has had its property confiscated without due process of law, and without just compensation, in violation of both State and Federal Constitutional Provisions."

V

The Federal Questions Are Substantial

This case presents several important federal questions arising under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the Constitution, and the Natural Gas Act. The PSC order is contrary to the following fundamental principles of federal law. This Court has repeatedly held:

(1) Utilities are entitled to recover their operating expenses and earn a fair return on their property devoted to the public interest,

(2) Findings of fact must be supported by substantial evidence,

(3) Intrastate commerce cannot be regulated in such a manner that interstate commerce will be burdened or obstructed thereby, and

(4) The jurisdiction of the FPC under the Natural Gas Act is exclusive and invalidates conflicting state regulation.

1

Confiscation. When rates are based on the minimal rate base (original cost less depreciation) as in this case (Appendix D), that part of the rate base on which no return will ever be earned is confiscated. The PSC's order fixed rates which will not permit Amere to recover $184,000 *per year* of its cost of gas purchased and paid for at FPC rates—the only rates under which it could obtain the gas to serve its customers. The magnitude of the resulting confiscation is demonstrated by the fact that the Commission found Amere's average net original cost rate base (applicable to both interstate and intrastate service) to be $3,413,151[8] on which it found Amere

should receive a return of 6¼ per cent, or $213,322. (Appendix D) The $184,000 which was disallowed is only approximately $29,000 per year less than the total return which the PSC found Amere was entitled to receive. Since Amere cannot avoid paying the FPC rates for the gas it purchases, the effect of the disallowance of $184,000 of such cost is to deprive Amere of more than 85 per cent of its return and thereby confiscate 85 per cent of its rate base.

The PSC's orders in two successive rate cases indicated that it will never permit Amere to recover this expense unless (a) four natural gas companies, subject to FPC jurisdiction under the Natural Gas Act, conform their operations to the PSC's plan in violation of the Natural Gas Act, or (b) this court holds that the PSC's action is unlawful. The PSC pointed out in its statement of its reasons for the entry of its final order herein that the FPC would not permit the PSC's plan to be followed. (pp. 1, 23 *et seq.*) Amere, therefore, can never earn a return on 86 per cent of its total interstate and intrastate rate base if the PSC's order is permitted to stand unreversed.

This utility and the total investment in its plant will not only be completely wiped out if the PSC's order is not reversed, but without earnings, it obviously cannot continue serving either its interstate or intrastate customers.

This Court has repeatedly held that rate making orders though legislative in nature must be reviewed by the

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[6]In its cost of service, the PSC Staff showed revenues for the transportation of gas in interstate commerce to Bluefield Gas Company as Other Gas Revenues (Staff Exhibit No. 1, Schedule 1, p. 1, line 12) and therefore, showed the total rate base and a return thereon in determining the revenue deficiency. (PSC Staff Exhibit 1, Schedule 15, p. 1, line 9 and line 15)

courts as to both law and facts under the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Bluefield Water Works and Improvement Co.* v. *Public Service Commission*, 262 U. S. 679, 43 S. Ct. 675, 67 L. ed. 1176 (1923); *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527, 64 L. ed. 908 (1920). The reasoning underlying this doctrine was stated in *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38, 56 S. Ct. 720, 80 L. ed. 1033 (1936),* which held that the Constitution fixes limits to the rate making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation; that legislative declarations or findings with respect to rates are necessarily subject to independent judicial review on the facts and the law "to the end that the Constitution as the supreme law of the land may be maintained."

The Court stated:

> "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.

*This case states limits to the rate making power under the due process clause of the Fifth Amendment, however, this Court stated in *Federal Power Commission* v. *Natural Gas Pipe Line Company of America*, *supra*, that the power to regulate rates under the Fifth Amendment is at least as great as that of the states under the Fourteenth.

> * * * The principle applies when rights either of person or of property are protected by constitutional restrictions." (p. 52)

2

Arbitrary Findings. Even if the PSC's action was not otherwise unlawful, its findings as to the price which Amere should pay for gas are unsupported by evidence. The staff witness, on whose exhibit and testimony the PSC based its determination of the cost to be allowed for gas purchased, stated that he assumed Amere's requirements in excess of the locally produced gas would be purchased from United (T. 259), and transported to Amere by Atlantic. (T. 260) He assumed that United would receive forty cents (40¢) per Mcf for such gas, (T. 241) and that it would pay Atlantic for (a) transporting the gas sold by United to Amere, (b) transporting gas (never owned by United) from Amere's Beckley-Mullens area to its other operating areas, (T. 270-278) and (c) receiving Columbian Carbon Company gas (never owned by United) from Amere *in the summer* and delivering equal volumes of gas to Amere *in the winter*. (T. 277-278) The witness admitted that he had made no study of Atlantic's cost of performing any of such transportation and exchange services. (T. 269, 279 and 280) The witness also admitted that the average cost per Mcf of the gas purchased by Atlantic for its other customers (at FPC rates) would be increased if Atlantic received gas for the account of Amere *in the summer* and purchased equal volumes of gas *in the winter* for delivery to Amere. (T. 280) He did not, however, make any study to determine the effect of the assumed transactions between United, Atlantic and Amere upon Atlantic's cost of serving its other customers. (T. 282)

The record is wholly devoid of any evidence with respect to the costs Atlantic would incur under the PSC's plan. (T. 269, 279 and 280) There is no evidence with respect to United's overhead costs related to the gas which the PSC found should be purchased by United and sold to Amere, although the PSC's staff witness admitted that United's books contain an account which reflects costs of this nature. (T. 267) There is, therefore, no support in the record for the PSC's conclusion that forty cents (40¢) per Mcf applied to the volumes of gas which it said Amere should purchase from United would be adequate (a) to pay for such gas, and (b) to enable United to pay Atlantic for the assumed transportation and exchange services.

This Court has repeatedly held that findings of fact must be supported by substantial evidence. "A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law." *Federal Radio Commission* v. *Nelson Brothers B. & M. Co.*, 289 U. S. 266, 53 S. Ct. 627, 77 L. ed. 1166 (1933). "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established." *N.L.R.B.* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299, 59 S. Ct. 501, 83 L. ed. 660 (1939). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *National Labor Relations Bd.*, 305 U. S. 197, 59 S. Ct. 206, 83 L. ed. 126 (1938).

The cost which the PSC allowed in lieu of the actual cost of gas purchased by Amere is clearly arbitrary, being wholly unsupported by evidence, and Amere is deprived of due process of law.

3

Interstate Commerce Impaired. The intrastate rates prescribed by the PSC will impair Amere's ability to render service in interstate commerce under the Natural Gas Act. As heretofore pointed out, the confiscation under the PSC's order is of such magnitude that Amere's very existence is in peril. The PSC's order, therefore, not only confiscates Amere's property but also burdens and obstructs interstate commerce by impairing Amere's ability to continue its interstate service. This Court has frequently held that non-compensatory intrastate rates obstruct and burden interstate commerce when the utility's ability to render adequate interstate service is injuriously affected. *Houston, East and West Texas Railroad Co.* v. *U. S.*, 234 U. S. 342, 358, 34 S. Ct. 833, 58 L. ed. 1341 (1914); *Railroad Commission of Wisconsin* et al. v. *Chicago, Burlington & Quincy Railroad Co.*, 257 U. S. 563, 585, 42 S. Ct. 232, 66 L. ed. 371 (1922); *Florida* v. *U. S.*, 282 U. S. 194, 210-211, 51 S. Ct. 119, 75 L. ed. 291 (1930).

4

Conflict with Federal Regulation. Pursuant to the Commerce Clause, Congress delegated authority to the FPC to regulate the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and natural gas companies engaged in such transportation or sale. (N.G.A. § 1(b), 52 Stat. 821 (1938); 15 U.S.C. § 717) *Panhandle Eastern Pipeline Company* v. *Public Service Commission of Indiana*, 332 U. S. 507, 516, 68 S. Ct. 190, 92 L. ed. 128, 137 (1947). The Act provides that all rates and charges and all rules and regulations pertaining to such rates shall be filed

with the FPC and no changes shall be made except in the manner prescribed therein. It specifically provides for complaints to the FPC by any state commission with respect to any effective or proposed rate on file with the FPC. (§ § 4 and 5) The Act and the FPC Rules of Practice and Procedure permit state commissions to participate in hearings before the FPC and if aggrieved by the FPC's final order, the commission may appeal. § § 15(a), 19 N.G.A., 12 F.R. 8471, § 1.8. Cf. *Phillips Petroleum Company* v. *State of Wisconsin*, 347 U. S. 672, 74 S. Ct. 794, 98 L. ed. 1035 (1954)

The PSC did not appeal the FPC's final order in Docket No. G-1384, when the FPC failed to adopt the PSC's recommendation with respect to Atlantic's rates to Amere, nor in Docket No. G-2054 when the FPC rejected the PSC's treatment of the Columbian Carbon Company gas. Instead it has attempted to nullify FPC action insofar as such rates are concerned. In two consecutive cases, the PSC has disallowed the actual expenses incurred for gas purchased by Amere. In the instant case it has fixed Amere's rates on alleged costs, arbitrarily assumed, based on the PSC's assumption of power (a) to require abandonments of interstate service by Columbian Carbon Company, Godfrey L. Cabot, Inc., United, and Atlantic, (b) to require the transportation in interstate commerce by Atlantic of gas owned by others, (c) to require the delivery by Atlantic of Kentucky gas to Amere in the winter in exchange for West Virginia gas in the summer, and (d) to fix rates for the transportation and sale of natural gas in interstate commerce.

Under the Natural Gas Act the jurisdiction of the Federal Power Commission under Sections 4 and 5, the rate

sections, Section 7(c), the certificate section, and Section 7(b), which prohibits the abandonment of any sale in interstate commerce, extends not only to Atlantic, which is admittedly subject to the exclusive jurisdiction of the Federal Power Commission, but also to Columbian Carbon Company, and Godfrey L. Cabot, Inc., independent producers which sell natural gas produced in West Virginia to Atlantic for resale in interstate commerce, *Phillips Petroleum Company* v. *State of Wisconsin, supra,* and to United, which sells natural gas produced and purchased in West Virginia to Atlantic (at FPC rates) for resale in interstate commerce.

Even if the PSC could require the abandonments of interstate sales for resale of natural gas produced in West Virginia by Columbian Carbon Company, Godfrey L. Cabot, Inc., and United without regard to the Commerce Clause and Section 7(b) of the Natural Gas Act, it is agreed that 78 per cent of all gas delivered to Amere from Atlantic's facilities would still be transported by Atlantic in interstate commerce from Kentucky (Stipulation dated May 3, 1955). There is no way the West Virginia gas could be separated from the Kentucky gas for delivery to Amere. (T. 481) And even if the West Virginia gas in Atlantic's pipe line could be separated from the much larger quantities of Kentucky gas, there would not be adequate quantities of West Virginia gas available to Atlantic to meet Amere's requirements during winter months. (T. 477) The PSC based its action on a finding only that United, Godfrey L. Cabot, Inc., and Columbian Carbon Company sell enough West Virginia gas to Atlantic to meet Amere's requirements on an *annual basis.* (Appendix B) It is not questioned that

Amere would require gas from Kentucky to meet its winter requirements.

The PSC order is clearly in conflict with the Natural Gas Act. "The power to fix rates for natural gas transported and sold in interstate commerce has been entrusted solely to the Federal Power Commission." *Public Utilities Commission of Ohio* v. *United Fuel Gas Company*, 317 U. S. 456, 468, 63 S. Ct. 369, 87 L. ed. 396 (1943). Congress meant to create a comprehensive dual system of regulation of the natural gas industry without any confusion of functions—federal and state regulatory bodies operating side by side, each active in its own sphere. *Public Utilities Commission of Ohio* et al. v. *United Fuel Gas Company, supra*, p. 467. If the PSC's order is not reversed, this intent of Congress will be thwarted completely and natural gas companies, under the Natural Gas Act, will be subjected to a hodge podge of conflicting state and federal regulations. cf. *Natural Gas Pipeline Corporation of America* v. *Corporation Commission of Oklahoma*, 349 U. S. 44, 75 S. Ct. 576, 99 L. ed. 866 (1955). Such result would necessarily impair service to consumers, whom the Natural Gas Act was intended to protect, *F.P.C.* v. *Hope Natural Gas Company*, 320 U. S. 591, 610, 64 S. Ct. 281, 88 L. ed. 333 (1947), and would discourage further investment in the natural gas industry.

Admittedly, the PSC's formula for fixing Amere's rates is based on assumed changes in Atlantic's operations which would increase Atlantic's cost of service to its other interstate customers. The Commission's witness admitted that Atlantic's unit cost of gas produced under United's FPC rates would be increased if Atlantic delivered *winter gas* to Amere in exchange for *summer gas* (T. 280), but said he gave no consideration to the effect of

such increased cost on Atlantic's other interstate customers. (T. 282) The PSC's order was not based on any study of the cost to Atlantic of performing the services which were assumed under the PSC's plan. (T. 279, 280, 282) The PSC has clearly attempted to regulate interstate commerce to the advantage of Amere's West Virginia consumers and at the expense of Atlantic's interstate customers outside of West Virginia. Such action conflicts with the national interest, which Congress sought to protect by prohibiting "undue preference or advantage" or "any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." (Natural Gas Act § 4(b)).

It is well settled that the interest of a state cannot be served at the expense of the national interest where interstate commerce is involved, and a state may not regulate interstate commerce so as to affect its flow or deprive it of needed uniformity in its regulation. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 779-780, 782, 65 S. Ct. 1515, 89 L. ed. 1915, 1930, 1931-1932 (1945).

The supremacy of federal laws over state laws regulating interstate commerce invalidates the PSC's action in this case. This Court held in *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 62 S. Ct. 384, 86 L. ed. 371 (1942), that state regulation requireing a natural gas company to provide interstate service to a local customer was unlawful because the Natural Gas Act had given the FPC jurisdiction over such service. In *Natural Gas Pipe Line Company of America* v. *Corporation Commission of Okla., supra*, this Court held that an order of the Oklahoma Commission fixing the minimum field price of gas as a conservation measure, which

previously had been upheld under the Commerce Clause, was unlawful because it was in conflict with the Natural Gas Act. It follows that the PSC's action in the instant case is unlawful because it is based upon findings that four natural gas companies under the Natural Gas Act should change their operations and rates, and abandon service in violation of the Natural Gas Act.

While the utter destruction of Amere and the resulting deprivation of gas service to its more than 15,000 West Virginia customers, not counting its interstate wholesale business, is of great concern and entitled to the protection of Constitutional safeguards, such considerations, although substantial, may be transcended in importance by the unprecedented invasion of Federal jurisdiction by the PSC and the necessary effect thereof on future actions by both Federal and State Commissions.

It is therefore respectfully submitted that the federal questions are substantial and demand consideration by this Court.

CHARLES C. WISE, JR.,
TILFORD A. JONES
Attorneys for Amere Gas Utilities Company

APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County on the 9th day of December, 1955, the following order was made and entered, to-wit:

Amere Gas Utilities Company, Petitioner

vs.

The Public Service Commission of West Virginia,

Respondent

Upon petition for an appeal from and review and suspension of a final order made and entered by the Public Service Commission of West Virginia on the 30th day of June, 1955.

The Court, having maturely considered the petition filed herein on the 29th day of July, 1955, the record consisting of all papers, documents and evidence which were before the Public Service Commission at the hearing which resulted in the entry of the final order complained of; the statement of reasons of the Commission filed herein by the respondent, Public Service Commission of West Virginia, on October 14, 1955; reply of petitioner to said statement of reasons, filed on the 19th day of October, 1955; respondent's rejoinder to petitioner's reply to the Commission's statement of reasons, filed on the 31st day of October, 1955; and the oral argument of counsel on the 18th day of October, 1955, the date fixed by the Court for hearing upon the aforesaid petition; the Court is of

opinion that the petitioner has not shown itself entitled to the relief prayed for in its said petition.

It is therefore considered and ordered by the Court that the prayer of the petition for an appeal, review and suspension in this proceeding be and the same is hereby denied, with prejudice, for the reason that the final order of the Public Service Commission of West Virginia, dated June 30, 1955, is found to be plainly right.

It is further ordered that the record certified to the Clerk of this Court by the Public Service Commission of West Virginia, shall be held by the Clerk of this Court pending application by petitioner to the Supreme Court of the United States for a writ of *certiorari*. Judge Riley absent.

A True Copy Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX B

PUBLIC SERVICE COMMISSION

OF WEST VIRGINIA

CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA at the Capitol in the City of Charleston on the 30th day of June, A. D. 1955.

CASE NO. 4129

AMERE GAS UTILITIES COMPANY, a corporation
Investigation and suspension of rates and charges.

Motion for reopening and rehearing.

This proceeding came on to be heard this 30th day of June, 1955 for further consideration upon the proceedings heretofore had and orders entered pertaining to the matters involved herein; upon the petition of the respondent, Amere Gas Utilities Company, a corporation, for reopening and rehearing for the purposes mentioned in said petition, received March 7, 1955 and filed herein on March 24, 1955; upon the order made on March 24, 1955 reopening this proceeding for the purpose of giving the respondent an opportunity to introduce such evidence as it might have in support of Paragraphs "a", "b", "c" and "j" in its aforesaid petition and the protestants and Commission's staff an opportunity to introduce such evidence as they might have in support of their positions with respect to said Paragraphs "a", "b", "c" and "j" and denying said petition in all other respects; upon the evidence adduced at a hearing held herein on April 18, 1955; upon the record in Case No. 3888 and the entire

record in this case in so far as it pertains to the matters now involved in this proceeding by reason of the filing of said petition and the purposes for which it was set for hearing; and upon the memorandum of the petitioner, Amere Gas Utilities Company, received and filed May 13, 1955.

Upon consideration whereof it appears and the Commission finds that no useful purpose would be served by reiterating here what was said in Case No. 3888 and in this case pertaining to the matters involved herein further than to say that in so far as the quantity of gas available to the petitioner during the test period and the source from which it was obtained are concerned, the prayer of said petition should be denied for the reason that, in the opinion of the Commission, the testimony of George R. Heath, of the Commission's accounting staff, shows that a sufficient quantity of gas could and should have been made available to the petitioner during the test period in accordance with the plan fully set out in the Commission's report and order in said Case No. 3888 and in its order made in this case on February 25, 1955, without using any part of the so-called Thacker gas which could also have been made available to the petitioner during the test period.

Upon like consideration the Commission further finds that approximately 5½% should have been used in arriving at the tax savings instead of 8% referred to and used in said order of February 25, 1955, which makes it necessary for the petitioner to increase its rates as it is hereinafter authorized to do, and that in all other respects the matters involved in the aforesaid petition should be denied.

It is, therefore, ordered that the petitioner, Amere Gas Utilities Company, a corporation, be, and it hereby is, permitted and authorized to increase its rate for the first thousand cubic feet of gas used per month and the minimum monthly charge by five cents each in the entire territory served, making the rate applicable in Beckley, Mabscott, Lester, and Sophia, Raleigh County, Mullens, Wyoming County, and rural districts served in Raleigh and Wyoming Counties $1.35 for the first thousand cubic feet or less used per month and the minimum charge $1.35 in said areas, and the rate applicable in Athens and Princeton, Mercer County, Lewisburg, Ronceverte, and White Sulphur Springs, Greenbrier County, and rural districts served in Greenbrier, Mercer, and Summers Counties for the first thousand cubic feet or less used per month $1.40 and the minimum monthly charge $1.40 in said areas, effective July 1, 1955.

It is further ordered that in all other respects the prayer of the aforesaid petition be, and it hereby is, denied.

A Copy.

Teste: M. F. WRIGHT, JR.
Secretary

APPENDIX C

PUBLIC SERVICE COMMISSION

OF WEST VIRGINIA

CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA at the Capitol in the City of Charleston on the 24th day of March, A. D. 1955.

CASE NO. 4129

AMERE GAS UTILITIES COMPANY, a corporation
Investigation and suspension of rates and charges.

Motion for reopening and rehearing.

This proceeding came on to be heard this 24th day of March, 1955 for further consideration upon the duly verified petition of the respondent, Amere Gas Utilities Company, a corporation, received March 7, 1955, for reopening and rehearing of this proceeding for the purpose of giving the respondent an opportunity to introduce "newly discovered" evidence in support of the allegations set out in said petition.

Upon consideration whereof the Commission is of opinion and finds that this proceeding should be reopened for the purpose, and for the purpose only, of giving the respondent an opportunity to introduce such evidence as it may have in support of Paragraphs "a," "b," "c" and "j" in its aforesaid petition and the protestants and the Commission's staff an opportunity to introduce such evidence as they may have in support of their positions with respect to said Paragraphs "a," "b," "c" and "j"; and that in all other respects said petition should be denied.

The Commission further finds that the exhibits attached to said petition for reopening and rehearing of this proceeding should not be received and filed as a part of the record in this proceeding.

The Commission further finds that the order entered in this case on February 25, 1955 should continue and remain in full force and effect until and unless changed by a further order of the Commission.

It is, therefore, ordered that this proceeding be, and it hereby is, reopened for the purposes hereinbefore mentioned, subject to the limitations hereinbefore set out.

It is further ordered that the exhibits attached to the respondent's aforesaid petition and all reference in said petition to the same be, and they hereby are, stricken from said petition.

It is further ordered that after said exhibits and reference thereto have been stricken therefrom, said petition for reopening and rehearing be, and it hereby is, filed.

It is further ordered that the aforesaid allegations contained in Paragraphs "a," "b," "c" and "j" of the aforesaid petition be, and they hereby are, set for hearing in the Commission's Hearing Room at the Capitol in the City of Charleston on April 18, 1955 at 10 a. m. for the purposes hereinbefore mentioned.

It is further ordered that in all other respects the aforesaid petition be, and it hereby is, denied.

It is further ordered that the order entered in this case on February 25, 1955 shall continue and remain in full force and effect until and unless changed by a further order of this Commission.

It is further ordered that the Secretary of the Commission give notice to the respondent and to the protestants in this proceeding of the aforesaid hearing and the purpose thereof by mailing to each of them, by registered mail, a copy of this order.

A Copy.

Teste: M. F. WRIGHT, JR.
Secretary

APPENDIX D

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA at the Capitol in the City of Charleston on the 25th day of February, A. D. 1955.

CASE NO. 4129

AMERE GAS UTILITIES COMPANY, a corporation
Investigation and suspension of rates and charges.

This proceeding came on to be heard this 25th day of February, 1955 upon the revised tariff sheets offered for filing by Amere Gas Utilities Company, a corporation, hereinafter called "respondent," designated Fourth Revision of Original Sheet No. 8, P.S.C. W. Va. No. 2, canceling Third Revision of Original Sheet No. 8, and Third Revision of Original Sheet No. 8-A, P.S.C. W. Va. No. 2, canceling Second Revision of Original Sheet No. 8-A, issued August 9, 1954, effective November 1, 1954, stating increased rates and charges for furnishing natural gas service to its customers in West Virginia, except for sales to the Bluefield Gas Company, which rates are designed to increase the respondent's annual revenue $334,120, based on its sales during the test period used herein, which is for the twelve months ended August 31, 1954; upon the order entered herein on August 24, 1954 setting said matter for hearing and suspending the rates and charges stated in the aforesaid tariff sheets and deferring the use thereof until February 28, 1955 unless otherwise ordered by the Commission; upon proof of the

giving of notice of the filing of said tariff sheets as required by said order of August 24, 1954; upon the protests of the Citizens Committee of the city of Beckley, Raleigh County, and the City of Beckley, a municipal corporation, by Benjamin D. Tissue, attorney at law of Beckley, and the City of Princeton, Mercer County, by W. R. Carr, City Attorney; upon the evidence adduced at hearings held herein on October 14, 1954 and January 6, 7, and 28, 1955; upon the report and order made in Case No. 3888 and the entire record therein in so far as it pertains to the matter involved herein, which record was made a part of this proceeding by reference; upon that part only of the duly verified statement of R. J. Ryder, received February 14, 1955, pertaining to the inquiry made by the presiding commissioner at the hearing held herein on January 28, 1955, as shown at pages 385, 386, and 387 of the transcript of the reporter's notes taken at said hearing; and upon the petition of the respondent "to reopen this proceeding to permit the introduction of newly discovered evidence," received in the afternoon of Friday, February 25, 1955, making it necessary to rewrite this order.

From all which it appears that in its aforesaid report and order made on August 31, 1953 in Case No. 3888, the Commission set out, in detail, the reasons for the formula or plan it used in arriving at its conclusions therein; and that no useful purpose would be served by restating said conclusions here further than to say that the Commission's staff, in the preparation of their exhibit filed herein and the conclusions therein set out, followed substantially the Commission's formula used in Case No. 3888.

It further appears that the respondent disregarded—in fact, it seems that it ignored—the formula used by the

Commission in reaching its conclusions in its aforesaid report and order in Case No. 3888; and that the principal, if not the only reason assigned by the respondent for its failure to follow the Commission's said formula was that it would have conflicted in certain particulars with the procedure followed by the staff of the Federal Power Commission in determining the rate applicable to gas furnished by the Atlantic Seaboard Corporation to the respondent, which rate was subsequently reduced from 60 cents per thousand cubic feet to 40 cents or less, and by reason of the fact that Atlantic Seaboard Corporation had filed a tariff with the Federal Power Commission stating an increase of ten cents per thousand cubic feet in the rate for gas it sold to the respondent, or an increase from 40 cents to 50 cents per thousand cubic feet, which rate, in so far as the record in this proceeding shows, has not been approved by the Federal Power Commission.

It further appears that if the respondent had followed the Commission's formula in Case No. 3888 in the preparation of its exhibits for use in this proceeding, with such changes as it deemed necessary to conform to its experience during the test period used herein, much time would have been saved by the Commission's staff, as all that would have been necessary for them to do would have been to check the changes proposed by the respondent and prepare an exhibit showing the result of their conclusions with respect to said changes, and the matters involved herein could have been submitted to the Commission for decision at a much earlier date.

It further appears that the Commission recommended in its aforesaid report that the property of the respondent be merged with the property of the United Fuel Gas Company, for reasons stated in said report; and that in-

stead of said recommendation being followed, the stock of the respondent, at that time owned by the Atlantic Seaboard Corporation, was transferred by said corporation to the parent company, The Columbia Gas System, Inc.

It further appears that the total quantity of gas sold by the respondent during said test period, exclusive of the gas sold to the Bluefield Gas Company for resale, was 3,176,439 Mcf; that the quantity of gas used by the respondent in its operations was 46,730 Mcf or a total of 3,223,169 Mcf sold and used by the respondent during said test period, excluding the quantity sold to the Bluefield Gas Company, the total of which was 237,790 Mcf; and that the total quantity of gas available to the respondent during said test period, according to the formula used by the Commission in Case No. 3888, was 7,978,580 Mcf or 4,517,621 Mcf in excess of the respondent's total sales, including Bluefield and the gas it used in its operations during said test period.

It further appears that the respondent's average original cost rate base, its operating revenues and expenses, including provisions for a return of 6¼%, and the deficiency in its revenue for said test period, as determined by the Commission's staff, using the aforesaid formula in Case No. 3888, are as follows:

Average Net Original Cost Rate Base	
Gas Plant in Service	$3,850,646
Construction Work in Progress—Complete and in Service	40,330
Retirement Work in Progress	(3,893)
Less: Reserve for Depreciation and Amortization	593,201

Contributions in Aid of Construction	26,233
Total Net Investment	3,267,649
Working Capital	145,502
Average Net Original Cost Rate Base	3,413,151
Net Operating Revenues—Adjusted	
Operating Revenues—Gas	1,808,717
Operating Expenses—Gas	1,649,481
Net Operating Revenues—Gas	159,236
Deficiency at 6¼% Return	
6¼% Return on Rate Base (3,413,151 x 6.25%)	213,322
Less: Adjusted Net Operating Revenues	159,236
Deficiency Under Present Rates	54,086

In the preparation of the foregoing tabulation, the Commission's staff, at the suggestion of the Commission, did not deduct $2,296 representing material depreciation, and used tax savings of 8% instead of 8½%, both of which adjustments were made in P.S.C. Staff Exhibit No. 1.

It further appears that the contract under which the respondent was purchasing gas from the Columbian Carbon Company at Thacker, Mingo County was in effect during said test period and was not canceled until November 1, 1954 and by reason thereof the position taken by R. J. Ryder in his aforementioned statement and the position taken by the respondent in its aforementioned petition are untenable, as it was definitely understood at the hearing held herein on October 14, 1954 that only the experience of the respondent during said test period

would be considered by the Commission in arriving at its conclusions in this proceeding; and that by reason of said understanding the Commission's staff, in the preparation of their Exhibit No. 1, did not give any consideration to the fact that the Federal Income Tax which the respondent will be required to pay was reduced by the Congress from 52% to 47%, effective April 1, 1955.

It further appears that the effect—if not the purpose—of the respondent's filing of its aforementioned petition on February 25, 1955, for reopening of this proceeding, would be that the rates stated in its aforementioned revised tariff sheets would become effective February 28, 1955, just three days after the filing of such petition, two of which days are Saturday and Sunday, as the Commission cannot, under the law, further suspend the use of said rates.

It further appears that at the hearing held herein on January 6, 1955, Benjamin D. Tissue, counsel for the Independent Citizens Committee of Beckley and the City of Beckley, both of Raleigh County, made a motion, the effect of which was to cancel the aforementioned tariff sheets because the respondent had not followed the Commission's said formula in the preparation of its exhibits filed herein at the hearing held on October 14, 1954, which motion was renewed by said counsel near the close of the hearing held herein on January 28, 1955, as shown at page 71 of the transcript of the reporter's notes taken at said hearing of January 6, 1955 and at page 387 of the transcript of the reporter's notes taken at said hearing of January 28, 1955.

It further appears that shortly after this Commission, by order made in Case No. 3888 on March 26, 1953, au-

thorized the respondent to put into effect rates designed to increase its annual revenue by $183,099, the respondent, agreeable to an understanding had with the Federal Power Commission, reduced the rate at which it was furnishing gas to the Bluefield Gas Company, from 60 cents plus to something less than 40 cents per thousand cubic feet, a reduction of 33%.

Upon consideration whereof the Commission is of opinion and finds that the aforesaid petition filed herein by the respondent on February 25, 1955, "to reopen this proceeding to permit the introduction of newly discovered evidence," should be denied, for the reason that it was not timely filed and for the further reason that it would be more appropriate for the respondent to file such a petition after the Commission entered its final order in this proceeding, as provided by the Commission's Rules of Practice and Procedure.

The Commission further finds that the aforesaid motion of said Benjamin D. Tissue should be denied for the reason that the exhibit filed by the Commission's staff shows that there is a deficiency in the respondent's revenue for the test period used herein.

The Commission further finds that the aforesaid revised tariff sheets offered for filing by the respondent, designated Fourth Revision of Original Sheet No. 8, P.S.C. W. Va. No. 2, canceling Third Revision of Original Sheet No. 8, and Third Revision of Original Sheet No. 8-A, P.S.C. W. Va. No. 2, canceling Second Revision of Original Sheet No. 8-A, should be canceled and stricken from the tariff files of this Commission, for the reason that the rates stated therein are not just and reasonable in that they will produce revenue in excess of that neces-

sary to enable the respondent to pay its reasonable and necessary operating expenses, including taxes, and provide for depreciation in and a reasonable return on the value of its property as hereinbefore set out, or $3,413,-151, which amount the Commission fixes as the rate base in this proceeding.

The Commission further finds that the respondent's present rates are not just and reasonable in that the revenue realized by the respondent from their application is not sufficient for the aforementioned purposes, and that the rates hereinafter set forth are designed to produce additional annual revenue of at least $108,000, which is sufficient revenue for such purposes, including a return of 6¼% on the rate base hereinbefore fixed at $3,413,151.

It is, therefore, ordered that the aforesaid petition filed herein by the respondent on February 25, 1955, be, and it hereby is, denied for reasons hereinbefore stated.

It is further ordered that the aforesaid motion made by said Benjamin D. Tissue, counsel for the Independent Citizens Committee of Beckley and the City of Beckley, both of Raleigh County, be, and it hereby is, denied for reasons hereinbefore stated.

It is further ordered that said tariff sheets designated Fourth Revision of Original Sheet No. 8, P.S.C. W. Va. No. 2, canceling Third Revision of Original Sheet No. 8, and Third Revision of Original Sheet No. 8-A, P.S.C. W. Va. No. 2, canceling Second Revision of Original Sheet No. 8-A, be, and they hereby are, canceled and stricken from the tariff files of this Commission.

It is further ordered that the respondent, Amere Gas Utilities Company, a corporation, be, and it hereby is,

permitted and authorized to put into effect on February 28, 1955, the rates and charges hereinafter set out, for all gas furnished on and after said 28th day of February, 1955, as nearly as can be ascertained and determined from meter readings taken on and after said date, in lieu of its present rates and charges:

Applicable in Beckley, Mabscott, Lester, and Sophia, Raleigh County, Mullens, Wyoming County, and rural districts served in Raleigh and Wyoming Counties.

Available for general domestic, commercial, and industrial service.

Rate			
First	1,000 cubic feet or less used per month	$1.30	per thousand cubic feet
Next	1,000 cubic feet used per month	.73	per thousand cubic feet
Next	2,000 cubic feet used per month	.63	per thousand cubic feet
Next	96,000 cubic feet used per month	.48½	per thousand cubic feet
All over	100,000 cubic feet used per month	.47	per thousand cubic feet
Monthly Minimum Charge		$1.30	

Applicable in Athens and Princeton, Mercer County, Lewisburg, Ronceverte, and White Sulphur Springs, Greenbrier County, and rural districts served in Greenbrier, Mercer, and Summers Counties.

Available for general domestic, commercial, and industrial service.

Rate			
First	1,000 cubic feet or less used per month	$1.35	per thousand cubic feet
Next	1,000 cubic feet used per month	.78	per thousand cubic feet
Next	2,000 cubic feet used per month	.68	per thousand cubic feet
Next	96,000 cubic feet used per month	.62	per thousand cubic feet
All over	100,000 cubic feet used per month	.53	per thousand cubic feet
Monthly Minimum Charge		$1.35	

A copy.

Teste: M. F. WRIGHT, JR.,
Secretary

APPENDIX E

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, CHARLESTON

Case No. 3888

AMERE GAS UTILITIES COMPANY, a Corporation, Investigation and Suspension of Rates and Charges

APPEARANCES:

Charles C. Wise, A. M. Calland, and *Richard A. Rosan,* for Respondent;

Benjamin D. Tissue for the City of Beckley, protestant;

Fletcher W. Mann for the Independent Citizens Committee of the City of Beckley, protestant;

Ira M. Smith for the City of Princeton, protestant;

George L. Ballard for the Town of Sophia, protestant;

Ray Toler for the City of Mullens and the Chamber of Commerce of Mullens, protestants.

REPORT OF THE COMMISSION, *August 31, 1953*

BY THE COMMISSION:

This proceeding is before the Commission upon the revised tariff sheets offered for filing by Amere Gas Utilities Company, a corporation, hereinafter called "Respondent" or "Amere," which sheets were designated Third Revision of Original Sheet No. 8 to its Tariff P. S. C. W. Va. No. 2 and Second Revision of Original Sheet No. 8-A to said tariff, stating increased rates and charges for furnishing natural gas service to its customers in West Virginia, except sales to Bluefield Gas Company, which rates were designed to increase Respondent's annual revenue approximately $500,462, based on its 1952 sales. The

above mentioned revised tariff sheets were offered for filing on January 6, 1953, to become effective February 15, 1953. On January 8, 1953, the Commission entered an order suspending the use of the proposed increased rates until June 10, 1953, unless otherwise ordered by the Commission, and set the matter for hearing on February 24, 1953. At the hearing held on the last mentioned date, protests were made on behalf of the cities and organizations mentioned above, and numerous written protests previously received were noted in the record. After the completion of the Respondent's evidence at the last mentioned hearing, a motion was made on its behalf for an interim rate increase, pending examination of Respondent's books and records by the Commission's staff. By order of March 26, 1953, the Commission authorized Respondent to put into effect as of April 1, 1953, temporary rates designed to increase its annual revenues by approximately $183,099, which rates were put into effect upon the condition that should the Commission, in its final determination in this proceeding, find said interim rates to be excessive, refunds would be made by Amere to its customers as directed by the Commission. The Commission's staff made an examination of Amere's books and records, and at a hearing held herein on May 11, 1953, the results of this examination were introduced by the Commission's accountant, George Heath, along with other evidence on behalf of the Respondent and protestants. A final hearing was held on June 2, 1953, and this case was submitted for decision. On June 3, 1953, an order was entered further suspending the proposed increased rates until December 10, 1953, unless otherwise ordered by the Commission. Short briefs were filed on behalf of the various parties, the last of which was received on July 6, 1953.

History, Corporate Structure, Territory, and Growth of Amere

The predecessor of Amere, Beckley Gas Company, was organized in 1929. In 1930 the entire stock of the company was acquird by Columbia Gas & Electric Corporation (now The Columbia Gas System, Inc., hereinafter referred to as "Columbia"). In 1931 Atlantic Seaboard Corporation, hereinafter called "Atlantic," a subsidiary of Columbia, acquired from Columbia all of the capital stock of Amere, and Respondent remains a subsidiary of Atlantic, although negotiations are under way to make Amere a direct subsidiary of Columbia.

After the establishment of gas service in Beckley, the cities of Lewisburg, Ronceverte, White Sulphur Springs, Princeton, and Athens were added to the Respondent's system in the years 1931 and 1932 as a result of the construction by Atlantic of a 20-inch gas line from Boldman, Kentucky, to the eastern seaboard, which passed through the vicinity of these communities. Service to Mullens, Wyoming County, was begun by Amere in 1939. Altogether, as of December 31, 1952, Amere had 15,102 customers located in the following communities: Beckley, 7,246; Princeton, 2,478; Mullens, 992; Lewisburg, 940; White Sulphur Springs, 849; Mabscott, 634; Sophia, 632; Ronceverte, 573; Athens, 255; Lester, 122; and 381 rural customers. Of these customers, 13,505 are residential, 1,488 are commercial, 87 are municipal and public, and 22 are industrial. The system is divided into three distinct sections, namely, the Beckley-Mullens area, the Princeton-Athens area, and the Lewisburg-White Sulphur Springs area, and these sections are not interconnected by lines of Amere, but they are connected by the aforementioned 20-inch line of Atlantic.

Amere has had a constant and rapid growth, both in customers served and gas sold, as is illustrated by the fact that in 1931 it had an average of 1,102 customers using an average of 102 Mcf of gas annually, resulting in total annual sales of 112,580 Mcf, as compared to an average of 14,370 customers using an average of 203 Mcf annually, resulting in total annual sales of 2,926,036 Mcf in 1952. Amere originally purchased its entire gas supply from Ravencliffs Development Company, hereinafter called "Ravencliffs," which gas was used in furnishing service in Beckley, and this company is still the largest local supplier of gas to Amere. As heretofore noted, it was not until Atlantic constructed its 20-inch line that gas was made available to the Princeton-Athens area and the Lewisburg-White Sulphur Springs area, and no local gas has ever gone directly to these last mentioned areas, as the distribution system serving these areas is connected directly to Atlantic's line.

Amere also delivers gas to Bluefield Gas Company, which gas is originally furnished by Atlantic to Amere and transported through the latter's lines to a point near Princeton where it is taken by Bluefield Gas Company. Amere is paid a transportation charge for handling this gas. The rates to Bluefield Gas Company are under the jurisdiction of the Federal Power Commission and are not involved in this proceeding.

Gas Supplies and Purchases

As hereinbefore noted, Ravencliffs was the original local supplier of gas to Amere for the Beckley area. During the year 1952, Amere purchased from Ravencliffs 887,476 Mcf of gas and from other local suppliers the following amounts: Columbian Carbon Company, 647,-

406 Mcf; Hope Natural Gas Company, 92,886 Mcf; Owens-Libby-Owens Gas Department, 16,053 Mcf; and Ragland & Blackshear, 3,188 Mcf. These local purchases of gas total 1,647,009 Mcf for 1952. During the same period Amere received 1,473,090 Mcf from Atlantic, and exchanged 105,321 Mcf with Atlantic, making a net purchase from this source of 1,367,769 Mcf, and total purchases from all sources of 3,014,778 Mcf. For the purposes of this proceeding the calendar year 1952 has been adopted as the test period by the Respondent and accepted by the Commission.

Under an agreement with Atlantic, Amere delivers to Atlantic any surplus gas it has purchased from local producers, and at a later date Atlantic returns this gas to Amere. This procedure accounts for the 105,321 Mcf mentioned in the above paragraph. However, gas purchased from Columbian Carbon Company, hereinafter called "Carbon," is not included in this exchange agreement. There is a contract between Carbon, on the one hand, and Amere and Atlantic, on the other, which provides that Amere may take all of the gas it can use from Carbon's available supplies and that Atlantic will take all of the surplus. Carbon furnishes this gas at 24¢ per Mcf during the months of January, February, March, April, November, and December, and at 22.5¢ per Mcf for the remaining six months. It is the contention of the Commission's staff and of the protestants that there is no reason for treating the gas purchased from Carbon differently from that purchased from other local producers and that all of the Carbon gas should be sold to Amere, and that that portion delivered by Amere to Atlantic should be returned by Atlantic to Amere as exchange gas. This would result in a substantial saving to Amere because

Amere is now required to pay approximately 62¢ per Mcf for all gas purchased from Atlantic; whereas, as heretofore noted, the purchases from Carbon range from 22.5¢ to 24¢ per Mcf. It is further contended that this gas purchased from Carbon is transported through Amere's lines for a distance of 27 miles before being delivered to Atlantic's line, and that no charge is made to Atlantic for this transportation. In reply to this contention, the Respondent points to the contract with Carbon, to which Atlantic is a party, and contends that Carbon would not have entered into a contract with Amere alone. The Commission is not impressed with the contention of the Respondent that Carbon would not have entered into a contract with Amere individually. Amere is a subsidiary of Atlantic, and any contractual obligations undertaken by Amere are substantially guaranteed by its parent company. This contract has never been filed with or approved by this Commission. Further, Hope Natural Gas Company, one of the largest gas utilities in this state, entered into a contract with Amere alone. The Commission is not advised of the reasons of the Respondent or of its parent company for handling the purchases from Carbon as they do, but whatever their reasons may be, no justification has been shown in this proceeding for such method of operation; and as this manner of handling the gas is obviously detrimental to Amere's West Virginia customers, the Commission will treat all of the gas delivered by Carbon as being to the account of Amere, and that portion of the Carbon gas taken by Atlantic to be on an exchange basis with Amere the same as the other locally produced gas.

Staff Exhibit No. 1, page 2, shows Atlantic purchased from Carbon 627,476 Mcf of gas at 14.73 pound pressure

base during 1952. As the Commission deems that this gas should have been purchased by Amere and exchanged with Atlantic the same as the 105,321 Mcf purchased by Amere from other local producers, Amere's net purchases from Atlantic, excluding purchases for Bluefield Gas Company, for the test period should be reduced from 1,195,530 Mcf to 568,054 Mcf.

As to this remaining 568,054 Mcf of gas purchased from Atlantic by Amere at an average of 62¢ per Mcf under a contract on file with the Federal Power Commission, Heath has treated this gas as being properly subject to an exchange contract between the two companies, and under this hypothetical exchange agreement has charged Amere 40¢ per Mcf. This method, including the adjustment of the Carbon gas, results in a saving of $358,807 to Amere for the test period. In support of this method of handling sales between the two companies, Heath points out that in a recent rate proceeding before this Commission the evidence showed that Cumberland and Allegheny Gas Company and The Manufacturers Light and Heat Company, both Columbia subsidiary companies operating in the northern portion of West Virginia and in Pennsylvania and Maryland, are exchanging gas under a similar agreement. The agreement between the two last mentioned companies is on file with the Federal Power Commission, as is the agreement between Atlantic and Amere, and gas is exchanged at 37¢ per Mcf. During the twelve-month period ended May 31, 1952, Cumberland delivered to Manufacturers 1,772,826 Mcf and Manufacturers delivered to Cumberland 711,954 Mcf, resulting in Manufacturers receiving a net of more than one million Mcf under the exchange agreement. Heath states that there is no reason why Amere should not benefit from

such an exchange agreement with Atlantic in the same manner that Manufacturers benefits under its agreement with Cumberland, and that in his opinion 40¢ per Mcf is more than the cost of the service to Atlantic. To illustrate the inequities of the price Amere is required to pay Atlantic for gas, Heath also notes Amere's location with reference to the source of supply of gas. Flat Top, the point where Amere takes a large amount of gas from Atlantic, is 91.2 miles from Boldman, Kentucky, the beginning point of Atlantic's 20-inch line, and Washington, D. C., is 257.7 miles beyond Flat Top; yet Atlantic supplies gas to Washington, D. C., at only one cent more commodity charge and only ten cents more demand charge than it does to Amere at Flat Top. Obviously, the Federal Power Commission approved rates of Atlantic give only token consideration to the fact that Atlantic's West Virginia and Kentucky customers are much nearer to the source of supply than its Virginia and Maryland customers. As a matter of fact, this works only to the detriment of Amere, a Columbia controlled company, as it is the only customer of Atlantic in West Virginia or Kentucky, and to the benefit of gas distributing companies in Virginia, Maryland, and Washington, D. C., that are not Columbia companies. The record further shows that during the months of June, July, and August, 1952, Amere purchased no gas from Atlantic; yet under the agreement between the two companies on file with the Federal Power Commission, Amere had to pay Atlantic $101,228 as a result of the demand charge.

The Commission is reluctant to accept adjustments that are not based upon actual operation, and if the situation described in the preceding paragraph were the whole story, the Commission might reluctantly feel bound to

allow as a proper operating expense of Amere the 62¢ per Mcf it pays Atlantic for the 568,054 Mcf of gas received from Atlantic, after deducting the sales of Carbon to Atlantic. However, a part of this whole picture is the United Fuel Gas Company, hereinafter called "United," the supplier of the great portion of Atlantic's gas. United is also a Columbia subsidiary. In addition to distributing gas at retail in large sections of central and southern West Virginia, it is also the main supplier of gas to the whole Columbia system. United produces and purchases gas locally in West Virginia and Kentucky and also purchases gas from the transmission companies that bring gas from the southwest. All of the gas that goes into Atlantic's 20-inch line at Boldman, Kentucky, is supplied by United and is locally produced and purchased gas. Atlantic pays for this gas, and all other gas it obtains from United, under a Federal Power Commission tariff, and the average price for 1952 was approximately 26.5¢ per Mcf. However, the gas Atlantic delivers to Amere is not necessarily Kentucky gas that has been transported 91.2 miles to Flat Top, but at least a portion of such delivery is gas that Atlantic has transported only 28 miles. This results from an arrangement whereby United has gas that it produces or purchases in McDowell County transported for it by Godfrey L. Cabot, Inc., to Atlantic's 20-inch line at what is known as Brier Creek delivery point, located 11 miles west of Mullens. Information Exhibit No. 1, which was introduced in this proceeding at the request of the Commission, shows that this McDowell County gas is delivered to the account of United by Cabot at Meter No. 2063 on Atlantic's line, and Atlantic is billed for same under the last mentioned Federal Power Commission tariff. Under this arrangement Atlantic may then transport this gas, which cost it not more than 26.5¢ per

Mcf at Brier Creek (and for which Atlantic paid Cabot only 25¢ prior to September 1, 1952), to Flat Top, a distance of only 28 miles, and deliver it to Amere at 62¢ per Mcf. During the last four months of 1952 United delivered 802,470 Mcf of gas to Atlantic at Brier Creek, which is more gas than Amere purchased from Atlantic for the whole year, after deducting the gas Carbon sold to Atlantic.

In addition to its sales to Atlantic, United sells gas to several other Columbia companies. The territory served by Amere is in close proximity to that served by United. There is no reason why United could not be the direct supplier to Amere. If, in some instances, Atlantic's 20-inch line were required to transport the gas thus sold to Amere, Atlantic could be paid a reasonable transportation charge. This is a practice often followed by gas utilities, including the Columbia companies. Although Amere might not be able to obtain from United a rate as advantageous as the 26.5¢ per Mcf enjoyed by Atlantic, certainly this method of supplying gas to Amere would result in its paying less than the 40¢ per Mcf allowed by Heath in his computation of operating expenses. Considering all of the aforementioned factors, the Commission finds that said 40¢ per Mcf rate Heath has used is fair and equitable, and it will be adopted for the purposes of this proceeding.

As before mentioned, Columbia contemplates purchasing the stock of Amere from Atlantic, thus making Amere a direct subsidiary of Columbia. As Amere is located within the general territory of United, which is a much larger utility, it would seem feasible to merge the properties of Amere with United and thus solve the problems that arise from intercompany sales. If this merger were

consummated, United would then pay Atlantic a transportation charge for any use made of its 20-inch line, and Federal Power Commission commodity and demand rates would not be involved. United and Amere now have the same executive officers and the same home office, and the corporate records are kept at the same location. The Commission hopes that under these circumstances Columbia will reconsider its decision to make Amere a direct subsidiary and, instead, merge the Amere properties with United. In this manner the present customers of Amere would receive the benefit of being part of United, to which they are entitled, instead of the burden that is now imposed upon them as a result of the present corporate setup.

Operating Expenses

Operating expenses for the year ending December 31, 1952, were shown by the Respondent's books to be $1,425,626. Due to changes that occurred during the year, it is necessary to make certain adjustments in these amounts to arrive at a going level of operating and maintenance expenses as of December 31, 1952. These adjustments include increases in labor costs, increases in cost of gas purchased from local producers, as well as from Atlantic, and small adjustments in certain other items, which result in adjusted operating and maintenance expenses of $1,523,951 according to Amere's exhibits. Heath, in his exhibit, agrees substantially with the position of the Respondent except as to gas purchased from Atlantic by Amere, discussed at length in the preceding section. For the reasons stated therein, Heath's adjustments as to the cost of gas, and other minor adjustments shown in his exhibit, are accepted by the Commission for the purposes of this proceeding. This results in adjusted operating ex-

penses of $1,168,031 for the test period, which is $355,920 less than claimed by Amere.

Rate Base

The Respondent's rate base, as set forth in its exhibits, is based upon original cost of the property. This rate base was arrived at by taking the total gas plant in service as of December 31, 1951, which amounted to $3,149,453, and the total as of December 31, 1952, which amounted to $3,604,099, and averaging these two amounts results in an average gas plant in service of $3,376,776. This method of arriving at the value of the gas plant in service is the same as that used by the Commission in recent years in all of the rate proceedings before it involving major utilities. It is also the same method followed by the Federal Power Commission and a great majority of state regulatory agencies. The use of this method at the present time results in placing a lesser value on the utility's property than would be arrived at if a reproduction new or fair value rate base were established, but the Commission believes the original cost rate base to be the fairest means of valuing a utility's property and not subject to the constant variations inherent in the reproduction new method, which variations may from time to time, depending on current economic conditions, unduly favor either the utility or the consumer.

The rate base presented by the Respondent and that presented by the Commission's accountant, Heath, are nearly the same, Heath's rate base being slightly higher than claimed by the Respondent. For the purposes of this proceeding, the Commission adopts the Heath rate base, as follows:

Gas plant in service	$3,376,776
Construction work in Progress	143,127
Retirement work in progress	3,225
Total	$3,523,128
Less:	
Reserve for depreciation and amortization	491,946
Contributions in aid of construction	7,030
Total Net Investment	$3,024,152
Add:	
Cash working capital (1/8 of operating and maintenance expenses less cost of gas)	56,098
Materials and supplies	124,834
Prepaid accounts	5,725
Average Net Original Cost Rate Base	$3,210,809

Authorized Rates

In the Commission's order of March 26, 1953, in which it authorized Amere to put into effect interim increased rates as of April 1, 1953, the statement was made that higher rates were authorized in the Lewisburg-White Sulphur Springs and Princeton-Athens areas than in the Beckley-Mullens area because from the beginning of the company the Beckley-Mullens area had enjoyed a much lower rate due primarily to the availability of locally produced gas. The Lewisburg-White Sulphur Springs area and the Princeton-Athens area have always been supplied gas from Atlantic's 20-inch line. The interim rates heretofore mentioned increased gas in the Beckley-Mullens area to a greater extent percentagewise than in the other areas because the evidence in this proceeding indicated

that even in that area gas was required from the Atlantic line on 170 days during 1952, and evidence later introduced by Heath substantiates this by showing that Beckley uses 28.19% of the gas Amere purchases from Atlantic. Under these circumstances the Commission believes that the differential between the rates in the various areas, as established in its order of March 26, 1953, is as equitable an adjustment as can be made, and no change will be made therein.

For the reasons hereinbefore stated, the Commission has determined to accept the operating and maintenance expenses as set forth in the Heath exhibit on Schedule No. 13 in the amount of $1,448,977, adjusted so as to reflect the interim rate increase. The annual gross revenue produced by said interim rates has been determined to be $1,650,402, which indicates an expected net operating revenue of $201,425. In earning such net revenue, the Respondent will have a return of 6.27% on its average net original cost rate base of $3,210,809, as established under the heading "Rate Base." For a gas utility of this type and size, the Commission determines that 6.27% is a fair return, and, therefore, no changes will be made in the interim rates heretofore established, and said rates will be made permanent.

An order will be entered in accordance with the findings herein.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 31st day of August, A.D. 1953.

Case No. 3888

AMERE GAS UTILITIES COMPANY, a Corporation, Investigation and Suspension of Rates and Charges

This proceeding came on to be heard this 31st day of August, 1953, upon the revised tariff sheets offered for filing by Amere Gas Utilities Company, a corporation, hereinafter called "Respondent," designated Third Revision of Original Sheet No. 8 to its Tariff P. S. C. W. Va. No. 2 and Second Revision of Original Sheet No. 8-A to said tariff, which said new revisions cancel Second Revision and First Revision, respectively, of said sheets in said tariff, and state increased rates and charges for furnishing natural gas service to its customers in West Virginia, except sales to Bluefield Gas Company; upon the order entered herein on January 8, 1953, setting said matter down for hearing and suspending the use of the aforesaid rates and charges until June 10, 1953, unless otherwise ordered by the Commission; upon proof of the giving of notice as required by said last mentioned order; upon the protests noted in the hereinafter mentioned report; upon the evidence adduced at hearings held herein on February 24, May 11, and June 2, 1953; upon the order entered herein on March 26, 1953, authorizing the Respondent to put into effect temporary increases in its rates and charges, effective April 1, 1953; upon the order entered herein on June 3, 1953, further suspending the proposed rates and charges until December 10, 1953, unless otherwise ordered by the Commission; upon the briefs filed on behalf of the Respondent and the protestants; and upon the report of the Commission made this day and now filed herein and made a part hereof.

Upon consideration whereof and for the reasons set out in the aforesaid report, the Commission is of opinion and

finds that the rates and charges stated in the aforementioned revised tariff sheets are not just and reasonable in that same would produce more revenue than is required to enable the Respondent to pay its reasonable and necessary operating expenses, including taxes, and to provide for depreciation in and a return on its property used and useful in furnishing said gas service; that said tariff sheets should be canceled and stricken from the tariff files of the Commission; that the interim rates and charges the Respondent now has in effect, as authorized by the order entered herein on March 26, 1953, are just and reasonable and, if properly applied, should produce sufficient revenue for the above mentioned purposes; and that said interim rates now in effect should be made permanent.

It is, therefore, ordered tht the revised tariff sheets offered for filing by Amere Gas Utilities Company, a corporation, designated Third Revision of Original Sheet No. 8 to its Tariff P. S. C. W. Va. No. 2 and Second Revision of Original Sheet No. 8-A to said tariff, be, and they hereby are, canceled and stricken from the tariff files of the Commission.

It is further ordered that the Respondent, Amere Gas Utilities Company, a corporation, be, and it hereby is, permitted and authorized to continue in effect on a permanent basis the rates and charges authorized in the order entered herein on March 26, 1953, for all gas furnished by it in West Virginia, except for gas furnished Bluefield Gas Company.

A Copy.

Teste: M. F. WRIGHT, JR.
Secretary.

APPENDIX F

Chapter 24, Article 5, Section 1 of the Official Code of West Virginia of 1931, as amended, provides as follows:

"Any party feeling aggrieved by the entry of a final order by the commission, affecting him or it, may present a petition in writing to the supreme court of appeals, or to a judge thereof in vacation, within thirty days after the entry of such order, praying for the suspension of such final order. The applicant shall deliver a copy of such petition to the secretary of the commission before presenting the same to the court or the judge. The court or judge shall fix a time for the hearing on the application, but such hearing, unless by agreement of the parties, shall not be held sooner than five days after its presentation; and notice of the time and place of such hearing shall be forthwith delivered to the secretary of the commission, so that the commission may be represented at such hearing by one or more of its members or by counsel. If the court or the judge after such hearing be of the opinion that a suspending order should issue, the court or the judge may require bond, upon such conditions and in such penalty, and impose such terms and conditions upon the petitioner, as are just and reasonable. For such hearing the commission shall file with the clerk of said court all papers, documents, evidence and records or certified copies thereof as were before the commission at the hearing or investigation resulting in the entry of the order from which the petitioner appeals. The commission shall file with the court before the day fixed for the final hearing a written statement of its reasons for the entry of such order, and after arguments by counsel the court shall decide the matter in controversy as may seem to be just and right."

No. 751. AMERE GAS UTILITIES CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. Appeal from the Supreme Court of Appeals of West Virginia. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Charles C. Wise, Jr.* and *Tilford A. Jones* for appellant.